

IN THE COURT OF APPEAL, FIJI
[On Appeal from the High Court of Fiji]

CRIMINAL APPEAL NO.AAU 0081 of 2013
[High Court Criminal Case No. HAC 0155 of 2010]

CRIMINAL APPEAL NO.AAU 0129 of 2013
[High Court Criminal Case No. HAC 0155 of 2010]

CRIMINAL APPEAL NO.AAU 0042 of 2014
[High Court Criminal Case No. HAC 0155 of 2010]

BETWEEN : SULIANO WAISALE *01st Appellant*

: NETANI DOMONIBITU *02nd Appellant*

: SEREMAIA NALULU *03rd Appellant*

AND : THE STATE *Respondent*

Coram : Calanchini, P
Prematilaka, JA
Temo, JA

Counsel : 01st Appellant in person
: Mr. M Fesaitu for the 02nd Appellant
: 03rd Appellant in person
: Mr. M Korovou for the Respondent

Date of Hearing : 10 November 2017

Date of Judgment : 30 November 2017

JUDGMENT

Calanchini, P

- [1] I have read the draft judgment of Prematilaka JA and agree that the appeal against conviction and the appeal against sentence should be dismissed. I also agree that the Court should enhance the sentences imposed by the trial Judge in terms proposed by Prematilaka JA in his judgment.

Prematilaka, JA

- [2] The three appeals arise from the conviction of the Appellants along with two other accused on the following five counts, alleged to have been committed on 02 November 2010 at Lautoka.
- (i) Manslaughter contrary to section 239 of the Crimes Decree, 2009 by causing the death of Jose Anselime.
 - (ii) Aggravated Robbery contrary to section 311(b) of the Crimes Decree, 2009 by being armed with offensive weapons and committed robbery of Jose Anselime and Neila Anselime of a Sony Ericson mobile phone valued at \$300.00, a Brica Digital Camera valued at \$100.00, suitcase, a Targus laptop case, a Nike bag, a Puma handbag and a pram cover.
 - (iii) Aggravated Robbery contrary to section 311(b) of the Crimes Decree, 2009 by being armed with offensive weapons and committed robbery of Vilimaina Tinai of a Timex watch valued at \$300.00, a ladies handbag, a wallet and \$85.00 cash, contrary to section 311(b) of the Crimes Decree.
 - (iv) Act with intent to cause grievous harm contrary to section 255(a) of the Crimes Decree, 2009 by unlawfully wounding with intent to disable Jone Vesikula on the head with an iron rod.

(v) Assault causing actual bodily harm contrary to section 255(a) of the Crimes Decree, 2009 by punching Roger Anselme causing hematomas and a contusion.

- [3] The 01st, 02nd and 03rd Appellants were the 02nd, 05th and 01st accused respectively in the High Court. Before the trial commenced, the counsel for the 01st to 05th accused appears to have informed court on 09 July 2013 that the accused would not object to the admissibility of the caution statements and the charge statements. In addition, the counsel for the 05th accused appears to have spoken on behalf of all accused when she had informed court that the accused would plead guilty to all counts if the charge of murder were to be reduced to manslaughter, for the counsel for the 01st to 04th accused had not said anything to the contrary.
- [4] The prosecution had accordingly amended the Information reducing the count of murder to that of manslaughter and on 17 July 2013, all 25 counts in the Amended Information had been separately read over in Fijian language (presumably iTaukei) to all the Accused who were represented by the Counsel who had appeared only for the 1st to 04th accused on the previous day. The accused had understood and pleaded guilty to all the counts. The Court had specifically inquired from the counsel for the accused whether the pleas were in accordance with the instructions received and the counsel had replied in the affirmative. Thus, it is clear that even on the previous day the same counsel may well have associated herself with the counsel for the 05th accused in indicating the willingness of the 01st to 04th accused also to plead guilty to all the counts if the first count were to be reduced to manslaughter.
- [5] The detailed summary of facts along with the sketch plan of the crime scene, photographs of the reconstruction of the scene, records of interviews, post-mortem examination report of the deceased and the medical examination reports of the injured had been put to the accused. All accused had individually agreed with the summary of facts. The Trial Judge had accordingly found each of the accused guilty of all counts and convicted them separately on all individual counts on 16 July 2013.

- [6] The Learned Trial Judge on 23 July 2013 sentenced the 01st Appellant to 09 years of imprisonment with a minimum serving period of 07 years, the 02nd Appellant to 10 years of imprisonment with a minimum serving period of 08 years and the 03rd Appellant to 12 years of imprisonment with a minimum serving period of 10 years.
- [7] The 01st and 02nd Appellant appealed only against the sentence and the 03rd Appellant appealed against the sentence and conviction.
- [8] The Single Judge of the Court of Appeal who considered the Appellants' Leave to Appeal Application refused leave both in respect of sentence (01st and 02nd Appellants) and sentence and conviction (03rd Appellant) on 19 June 2015.

Relevant Facts as narrated by the Trial Judge in the Sentence Order.

- "[4] *Jose Anselme and his wife Neila lived with their three children (Roger 16, Alex 7 and Chana 3) in Tuvu, Lautoka where they owned and operated a beche-de-mer export enterprise. They employed Jone as a caretaker/security and Vilimaina as a housekeeper. Jone lived in the main house and Vilimaina was in a room abutting the house. There was in addition a bulk store for "Tuvu Seafood" located within the residence.*
- [5] *Nalulu (1st accused) worked in the beche-de-mer business in the West in 2010. He is related to Waisale (2nd accused). For 2 weeks prior to 1 November 2010 they planned to burgle and steal from Tuvu Seafood by invading the Anselme residence at night. They put together a team of 5. Tokamalua (3rd accused) and Biautubu (4th accused) had agreed to join the enterprise and Waisale recruited Domonibutu (5th accused)*
- [6] *On 1st November 2010, the Anselme family settled down for the night. Jone and Vilimaina also went to their beds. At 4.00 am on 2nd November the house was invaded by the gang.*
- [7] *Waisale and Domonibutu lived in Lami and they planned to travel to the West on 1st November 2010. They hired a taxi from Suva to take them. They told the driver that they were going to Lautoka to pick up beche-de-mer. They arrived in the taxi at 3.00 a.m. at Drasa seaside where by arrangement they picked up the others in the gang. The group directed the taxi to the Anselme residence which was pointed out to them all by Nalulu (1st accused). Weapons were distributed amongst the group and these weapons included knives and iron rods. After conferring together it was decided that the assault would be twofold: an invasion of the house to get cash and valuables and an invasion of the security guard's room to get the*

bulk store keys. They would carry this out masked and armed with their weapons.

- [8] Nahulu (1st accused) kicked open the door to Jone's room and he entered along with Waisele (2nd accused). They grabbed the keys to the store but Jone tried to resist them. He was hit on the head with an iron rod resulting in a 2 cm to 3 cm wound to his forehead which was deep and needed to be sutured.*
- [9] At the same time as events described in paragraph 8 were taking place, Domonibitu (5th accused) kicked open the door to the residence and with 3rd accused and 4th accused he entered the hallway. Jose and Neila (Mr & Mrs Anselme) jumped out of bed and Jone went to investigate. Roger Anselme (aged 16) met his father in the hallway and then went into the parents' bedroom where he and his mother tried to barricade the door to prevent entry.*
- [10] Jose (Mr Anselme) was still in the hallway and he engaged in a struggle with Domonibitu (5th accused) in the course of which Jose was stabbed "many times" in the stomach. Jose fell to the ground and when he tried to get up to call for help 3rd accused and 4th accused forcible prevented him from getting up.*
- [11] The gang managed to gain entry to the parents' bedroom where Roger was. They assaulted him on the face resulting in contusions and bruises. Mrs. Anselme had left to go to the neighbor to call for help. The group took Jose's mobile phone and a Brica digital camera. They also took several other smaller items being the property of Mr. & Mrs. Anselme.*
- [12] Vilimaina (the housekeeper) had been woken up by the melee and tried to flee the house. She was grabbed and brought back and her watch, handbag and wallet were stolen. There was \$85.00 cash in the wallet.*
- [13] The group then unsuccessfully tried to enter the bulk store but being unable to, rushed back to the taxi and drove away.*
- [14] Jose (Mr Anselme) lay in the house bleeding from his stomach. He succumbed at 6.00 pm on 2nd November, the cause of death being 'excessive blood loss from multiples tab wounds'.*
- [15] The taxi conveyed three of the group back to Lautoka and the other two back to Lami Town. The driver being suspicious of the groups' actions alerted the police. Acting on his information, all five were arrested and interviewed under caution and all five made admissions."*

- [9] Having considered that rather disturbing facts and circumstances of the case including the degree of brutality surrounding the death of the chief householder and being mindful of the fact that the **starting point** of the sentence for manslaughter (see **Navamocea v State** Criminal Appeal No.AAU0002 of 2006: 25 June 2007 [2007] FJCA 38) should be 10 - 14 years of imprisonment and the tariff for the offence of aggravated robbery is 10-16 years as laid down in several judicial pronouncements (see **Samuel Donald Singh v State** Criminal Appeal No. AAU 15 and 16 of 2011, **Nawalu v State** Criminal Appeal CAV 0012 of 2012: 28 August 2013 [2013] FJSC 11, **Nabainivalu v State** Criminal Appeal CAV 027 of 2014: 22 October 2015 [2015] FJSC 22, at the commencement of the hearing of the appeal, this Court indicated to the Appellants through the interpreter and the 02nd Appellant's counsel as prescribed in **Kumar v. The State** Criminal Appeal No. AAU 0018J of 2005: 29 July 2005 [2005] FJCA 54, that this court had the power to pass any other sentence warranted by law in terms of section 23(3) of the Court of Appeal Act if it thinks that a different sentence should have been passed, afforded an opportunity for them to make submissions in that regard and also informed them that, however the Appellants were free to canvass their appeals regardless, if they so wished.
- [10] The 01st Appellant informed Court that he wished to abandon his appeal. He completed the Notice of Abandonment in under Rule 39 in court. The Court asked the 01st Appellant several questions that were translated to him in iTaukei on the guidelines given in **Masirewa v. State** Criminal Appeal No. CAV0014 of 2008S:17 August 2010 [2010] FJSC 5 and in several other decisions of the Court of Appeal. According to his answers, the Court was satisfied that the Appellant's application to abandon his appeal was a considered decision that had been taken without any pressure but voluntarily and on his own free will. The Court was also satisfied that the Appellant fully understood and agreed to the consequences of the abandonment of his appeal. However, he wanted further time to obtain legal advice and accordingly his appeal would be listed in due course to consider the application to withdraw the appeal and for the Court to make an appropriate order.

- [11] The 02nd Appellant consulted his counsel who informed the Bench that his client nevertheless wished to proceed with the appeal. The 03rd Appellant also expressed his desire to proceed with his appeal. Accordingly, their appeals were taken up for hearing where all parties were heard on their respective cases.

Sentence

- [12] The Learned Trial Judge had said as follows of the method adopted in sentencing which seems justified in view of section 17 of the Sentencing and Penalties Act, 2009.

'Given that the crimes admitted here are without doubt crimes committed in the course of a joint enterprise, common sentences will be passed for each of the five offences and then adjustments to those sentences will be made in respect of each of the 5 accused taking into account that accused's peculiar circumstances'.

- [13] The Trial Judge had set out the following as common aggravating features.

- (i) Night time invasion;
- (ii) Use of masks creating more fear;
- (iii) Abuse of prior knowledge of layout and availability;
- (iv) Considerable pre-planning of the robberies;
- (v) Considerable destruction of property.

- [14] For the offence of manslaughter, the Learned Judge had adopted a starting point of 10 years imprisonment. 05 years had been added for aggravating features. Thus, 15 years had been taken as the base sentence for manslaughter.

- [15] The Judge had taken a starting point of 09 years imprisonment for the two counts of robbery and added 05 years for aggravating features of violence, use of dangerous weapons and the continuous fear Ms. Neila and her son experience and their inability to have a sound sleep following the incident. Thus, the final sentence for each of the counts of robbery had been decided as 14 years of imprisonment.

- [16] For the fourth count of assault with intent to cause grievous harm, the Learned Judge had taken a starting point of 06 years of imprisonment and added 02 years for the attack on the head of the security guard.
- [17] Finally, in respect of the common assault to Roger (last count) the Learned Judge had passed a sentence of 02 years.
- [18] Thereafter, the Judge pursuant to section 17 of the Sentencing and Penalties Decree had imposed an aggregate sentence of 15 years which had been used to make individual adjustments for each of the accused.

02nd Appellant's appeal

- [19] Accordingly, the Trial Judge had deducted 05 years for the 02nd Appellant's late plea of guilt and the time spent in remand (08 months) but not given any further deductions as the 02nd Appellant had 06 previous convictions of which 04 had been 'alive'. Thus, 10 years of imprisonment and a minimum serving period of 08 years before eligibility for a pardon had been imposed on the 02nd Appellant.
- [20] The 02nd Appellant had canvassed the sentence on the ground that 15 years of imprisonment for manslaughter was beyond the tariff.
- [21] As this Court indicated to the Appellant, his counsel and the counsel for the Respondent at the commencement of the hearing, I shall in the course of the judgment also consider whether the sentence imposed on the Appellant should be quashed and a different sentence warranted by law should be passed.
- [22] The power to quash the sentence passed on an appellant and pass a sentence warranted by law in substitution thereof on an appeal against sentence is given in section 23(3) of the Court of Appeal Act where the Court of Appeal is bound to interfere with the sentence if it thinks that a different sentence should have been passed. I think the Court of Appeal should exercise this power *sui moto* or *ex mero motu* in an appropriate case within the framework of section 23(3) even if there is no

appeal against the sentence and in any event when there is an appeal against the sentence, even without an application for enhancement by the State. Further, neither counsel doubted the power of this Court to revisit the sentence imposed on the Appellant on its own. The Court is only required to warn the Appellant that it has power to enhance the sentence and give an opportunity to make submissions in that regard (vide Kumar and Skipper v Reginam Criminal Appeal No.70 of 1978: 29 March 1979 [1979] FJCA 6).

- [23] The counsel for the State was content with the existing sentence whereas the counsel for the Appellant in his written submissions filed at the leave stage had argued based on Bae v State Criminal Appeal No. AAU0015u of 1998s: 26 February 1999[1999] FJCA 21 that that the sentence for manslaughter should have been within the range of suspended sentence to 12 years imprisonment. Therefore, he had argued that 15 years was outside the said range.
- [24] In Bae the only charge against the accused had been murder, later reduced to manslaughter which had resulted from a domestic dispute where the accused had assaulted the deceased with a plastic bottle with water and caused extensive injuries. Therefore, the facts and circumstances in Bae are very substantially different to those of the present case.
- [25] Secondly, in Navamocea the Court of Appeal indicated in the following words that the Court in Bae was not laying down an inviolable rule that a sentence for manslaughter should never be above 12 years.

'In the case of Kim Nam Bae v the State [1999] Criminal Appeal AAU 15/98, 26 February 1999, this Court pointed out the difficulty in setting any tariff for manslaughter because of the almost infinite range of circumstances found in such cases.'

'The Court was summarising the cases which had been drawn to its attention and was not professing to indicate a starting point for manslaughter sentences. Indeed such a wide range could never be of assistance in that respect. However, it has almost become standard for courts to regard twelve years as the upper limit for sentences for manslaughter. This may be one factor which accounts for sentences which

are frequently disproportionately low when compared with those for robbery and rape, particularly the latter.'

'It has taken some years for the courts to recognise the seriousness of violent robberies and rapes and to pass appropriate sentences. Over the same period this Court has seen a general decline in the level of sentences passed for manslaughter resulting from similarly violent robberies to as low as five and six years. That is clearly wrong.'

[26] Thereafter, the Court in Navamocea concluded

'We suggest that, in all cases of manslaughter where the death is the result of a deliberate infliction of violence in the course of committing another offence such as robbery in which grave violence was anticipated and any form of weapons used, the court should use a starting point of between ten and fourteen years imprisonment.'

[27] Therefore, in my view there is no requirement in law that the final sentence for manslaughter committed in the course of aggravated robbery should be within the a particular range but the starting point should be between ten and fourteen years of imprisonment. It could well be above 14 years provided the facts and circumstances so warrant.

[28] In Nawalu v State Criminal Appeal CAV 0012 of 2012: 28 August 2013 [2013] FJSC 11 His Lordship the Chief Justice said:

'Here the outstanding factors triggering a high penalty in the range 10-16 years were the spate of offending, the gravity of the anti-social behaviour with its menace to persons and property, the invasion of home and privacy, the violence proffered, and the need for very strong disapproval of such behaviour.'

[29] I do not think that there is anything in the above passage which could be taken to mean that the tariff of 10-16 years should only be for spate of robberies. Spate of robberies is only one factor among many that had been considered in determining the tariff of 10-16 years for robberies with violence.

[30] This becomes clearer from the fact that the Chief Justice had quoted the following passage from Calanchini P in Singh v State Criminal No. AAU15 and 16 of 2011: 26

October 2012 [2012] FJCA 71 which was concerned with *inter alia* robbery with violence under section 293 (1) (b) of the Penal Code:

"..there is ample authority in this Jurisdiction for concluding that the appropriate tariff for robbery with violence is now 10 to 16 years imprisonment. In selecting 10 years as a starting point the learned trial judge has started as the lower end of the range."

- [31] Once again the Supreme Court in **Wise v State** CAV0004 of 2015: 24 April 2015 [2015] FJSC 7 presided over by His Lordship the Chief Justice dealt with aggravated robbery with violence and said:

*'We are concerned with a single case here and not a spate of robberies Livai **Nawalu v The State** CAV0012/2012 at paragraphs 27-29, where the tariff for violent crimes of this nature was set at 10-16 years'*

'..... for what was a home invasion at night with violence inflicted, by a group of men, armed with weapons, namely a knife and an iron bar. For circumstances such as these, rightly abhorrent to the law-abiding community, will compel courts to harden their hearts and to impose harsher sentences'

'We believe that offences of this nature should fall within the range of 8 - 16 years imprisonment. Each case will depend on its own peculiar facts. But this is not simply a case of robbery, but one of aggravated robbery. The circumstances charged are either that the robbery was committed in company with one or more other persons, sometimes in a gang, or where the robbers carry out their crime when they have a weapon with them.'

- [32] **Nabainivalu v State** Criminal Appeal CAV 027 of 2014 : 22 October 2015 [2015] FJSC 22 the Supreme Court once again confirmed that in the following words:

*'the range for aggravated robbery is well established. The range is 10 to 16 years imprisonment (**Nawalu v State** Cr. App. No. CAV0012 of 2012)'*

- [33] In **Wise** the Supreme Court said that sentences will be enhanced where additional aggravating factors are also present and itemised the following as examples of such features. This list is obviously not exhaustive. In my view, this approach is an indication by the Supreme Court that in the case of an aggravated robbery with the following, similar or more serious features, the ultimate sentence could even go up to 16 years, the maximum being 20 years (*vide* section 311 of the Crimes Act, 2009).

- (i) Offence committed during a home invasion.
- (ii) In the middle of the night when victims might be at home asleep.
- (iii) Carried out with premeditation, or some planning.
- (iv) Committed with frightening circumstances, such as the smashing of windows, damage to the house or property, or the robbers being masked.
- (v) The weapons in their possession were used and inflicted injuries to the occupants or anyone else in their way.
- (vi) Injuries were caused which required hospital treatment, stitching and the like, or which come close to being serious as here where the knife entered the skin very close to the eye.
- (vii) The victims frightened were elderly or vulnerable persons such as small children.

[34] Further, the Supreme court in Wise stated:

'It is our duty to make clear these type of offences will be severely disapproved by the courts and be met with appropriately heavy terms of imprisonment. It is a fundamental requirement of a harmonious civilized and secure society that its inhabitants can sleep safely in their beds without fear of armed and violent intruders.' (emphasis added)

[35] It is very clear that almost all the additional aggravating factors highlighted by the Supreme Court in Wise are present in the current appeal before this Court with one more additional abhorrent factor; brutal killing of the chief householder.

[36] Therefore, in any event the sentence of 15 years is well within the tariff for aggravated robbery with accompanying violence and the Trial Judge was justified taking that as the aggregate sentence for manslaughter as well in terms of section 17 of the Sentencing and Penalties Act, 2009.

[37] Therefore, I reject the 02nd Appellant's appeal against the sentence.

Enhancement of the sentence

- [38] However, the matter does not end there. I shall now consider the adequacy of the sentence imposed on the 02nd Appellant and in the process deal with the 02nd Appellant's complaint on the 'early guilty plea'.
- [39] It is well established that if the trial judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some relevant consideration, then the Appellate Court may impose a different sentence. This error may be apparent from the reasons for sentence or it may be inferred from the length of the sentence itself (vide House v The King [1936] HCA 40; (1936) 55 CLR 499) and Bae.
- [40] To me, the facts and circumstances of this case would shock the conscience of any court and the law abiding and peace loving citizenry and those sentiments should be expressed by way of an appropriate sentence by this Court. In my view, the Learned Trial Judge had acted on a wrong principle and erred in law in taking the lowest ends of 10 years as the starting point for manslaughter and 09 years for aggravated robbery committed with extreme violence. In my view, he should have taken at least 12 years as the starting point for manslaughter and aggravated robbery. I would not disturb the addition of 05 years for common aggravating factors, thus arriving at an aggregate sentence of 17 years.
- [41] It is also revealed that the 02nd Appellant led the group of three of the five accused, kicked the door to the deceased's residence and stabbed the deceased running towards them several times in the stomach with the kitchen knife he was armed with on the hallway causing multiple stab wounds. He also entered the bed room of Mr. and Mrs. Anselme and punched Roger Anselme on the face causing contusions and bruises. His personal involvement in this extreme violence as an additional aggravating factor had not been taken into account by the Trial Judge and on that account I would add 1½ years to the aggregate sentence making it 18½ years.

[42] I would disagree with the Learned Judge in deducting 05 years for the late plea of guilt. In Wise the Supreme Court said:

'What is clearly not understood by the Petitioner is that a late plea such as one made just prior to the commencement of trial in the High Court is not to be treated as substantial remorse. All along he had maintained his plea of not guilty.'

'There is a difference in mitigation between an early plea of guilty and a late plea. A late plea, albeit that remorse was expressed by the Petitioner to the sentencing court and given credit for it [at para 9 of the Judge's sentencing remarks], will attract substantially less discount in sentence.'

[43] In Rainima v State Criminal Appeal No. AAU0022.2012: 27 February 2015 [2015] FJCA 17 the Court of Appeal said of the discount for a guilty plea as follows:

'Discount for a plea of guilty should be the last component of a sentence after additions and deductions are made for aggravating and mitigating circumstances respectively. It has always been accepted (though not by authoritative judgment) that the "high water mark" of discount is one third for a plea willingly made at the earliest opportunity. This Court now adopts that principle to be valid and to be applied in all future proceedings at first instance'.

'Pleas of guilty made at later stages than earliest opportunity cause more difficulties in the assessment of how much discount should be afforded to them. It is not for this Court to suggest an appropriate sliding scale because it must remain a matter of judicial discretion. We would however make three points very clear in this regard:

(i) A plea of guilty before trial must be afforded some discount given that the cost of trial (including time and cost of assessors) is saved.

(ii) A plea of guilty at a later stage before a trial involving a vulnerable witness must be given a meaningful discount (say 20-25%) to recognize the fact that the vulnerable witness is not put through the ordeal of giving evidence.

(iii) A plea during trial after an accused has heard unshakeable evidence of a victim/complainant or after an inculpatory caution interview has been admitted into evidence is not deserving of any discount whatsoever.'

[44] In Chand v State Criminal Appeal No. AAU0063 of 2012: 27 May 2016 [2016] FJCA 65 the Court of Appeal said that a plea of guilt should always be taken into

account when imposing the sentence and the weight to be given to a guilty plea depends on a number of factors such as:

- (i) Whether the plea of guilt is an indication of contrition independent of the fact of pleading guilty or whether the plea resulted from the recognition of the inevitable.
- (iii) Whether the plea of guilt could be considered as a factor in mitigation for saving the time and cost of the trial depending on when the plea was entered or indicated.

[45] In this case the 02nd Appellant from 2010 to 2013 (19 court days in the High court) had steadfastly maintained that he would contest the caution interviews and the case and then informed court that he would plead guilty for all counts only if the count of murder were to be brought down to that of manslaughter. I do not see any remorse in this exercise. Therefore, in my view 2 ½ years would be an appropriate reduction for the late guilty plea.

[46] Thus, the 02nd Appellant should be sentenced to 16 years of imprisonment (i.e. 18½ years – 2 ½ years). I would then consider 08 months of remand period as a period of imprisonment already served by the 02nd Appellant.

[47] Accordingly, I decide that in the result, the 02nd Appellant is sentenced to an imprisonment term of 15 years and 04 months with 13 years as the minimum period to be served before becoming eligible to be released on parole. Thus, the sentence passed at the trial is quashed and the following sentence is passed in substitution thereof.

Head Sentence – 15 years and 04 months.

Minimum period to be served – 13 years.

[48] The 02nd Appellant had also urged another additional ground of appeal with leave of court. His argument is that the Learned Judge should not have fixed a non-parole period as it would not allow for his rehabilitation.

- [49] Section 18 of the Sentencing and Penalties Decree 2009 deals with fixing of non-parole period by the sentencing court. The provisions relevant are as follows:

*“18(1) Subject to sub-section (2), when a court sentences an offender to be imprisoned for life or for a term of 2 years or more the court must fix a period during which the offender is **not eligible** to be released on parole.*

(2) If a court considers that the nature of the offence, or the past history of the offender, make the fixing of a non-parole period inappropriate, the court may decline to fix a non-parole period under sub-section (1).

(3).....

(4) Any non-parole period fixed under this section must be at least 6 months less than the term of the sentence.

(5) If a court sentences an offender to be imprisoned in respect of more than one offence, any non-parole period fixed under this section must be in respect of the aggregate period of imprisonment that the offender will be liable to serve under all the sentences imposed.”

- [50] In **Natini v State** Criminal Appeal No. AAU102 of 2010: 3 December 2015 [2015] FJCA 154 the Court of Appeal said:

“While leaving the discretion to decide on the non-parole period when sentencing to the sentencing Judge it would be necessary to state that the sentencing Judge would be in the best position in the particular case to decide on the non-parole period depending on the circumstances of the case.”

and further stated that the non-parole period

“was intended to be the minimum period which the offender would have to serve, so that the offender would not be released earlier than the court thought appropriate, whether on parole or by the operation of any practice relating to remission”.

- [51] In **Singh v State** Criminal Appeal No. AAU009 of 2013:30 September 2016 [2016] FJCA 126 the Court of Appeal held :

‘that the wording in section 18(1) and 18(2) is not suggestive that the intention of the Legislature in enacting that provision had rehabilitation of offenders in mind as sought to be argued by the Appellant. Quite contrarily it is deterrence and retribution that Parliament appears to have intended.’

[52] Therefore, I reject the additional ground of appeal as it lacks any merit.

03rd Appellant's appeal

Conviction

[53] The 03rd Appellant had appealed against the conviction and sentence. I can do no better than quoting in verbatim from the Ruling dated 19 June 2015 into Leave to Appeal Application regarding his appeal against the conviction which is based on the argument that his plea of guilt was not free, voluntary and unequivocal.

'Nalulu says that he pleaded guilty on the advice of his counsel. He now disagrees with that advice. He is not suggesting his counsel was flagrantly incompetent. Initially Nalulu was charged with murder. His counsel was able to get the charge reduced to manslaughter. Nalulu pleaded guilty to manslaughter, and as a result of his guilty plea he received substantial reduction in his sentence. There is no basis to argue that Nalulu's plea was equivocal. The facts admitted by Nalulu supported the charges. Leave to appeal against conviction is refused.'

[54] I cannot agree with the Single Judge more. The case record clearly shows that it had not been a sudden decision. The indication had been given by the counsel for the 05th accused (02nd appellant) on 09 July 2013 that the accused were willing to plead to all counts, if murder were to be reduced to manslaughter. Obviously, the counsel for the 01st to 04th accused (03rd Appellant was the 01st accused) had associated herself with that proposition. Thereafter, on 16 July 2013 all the counts in the Amended Information had been put to the accused in Fijian (iTaukei) and all had understood and pleaded guilty. The counsel for all the accused (including the 03rd Appellant) had specifically confirmed to court that the pleas were in accordance with the instructions received. Thereafter, the accused had admitted the summery of facts also. The case had been postponed to 19 July for mitigation and written submissions too had been tendered on behalf of all accused in mitigation.

[55] In **Bulivou v State** Criminal Appeal No AAU78 of 2010: 05 December 2014 [2014] FJCA 215, the Court of Appeal quoted **Turner vs. R** (1970) 2 QB 321, **Barnes** (1970) 55 Cr. App R 100 and 20th Edition of **Blackstone** at paragraphs

D.12.94 to D.12.98 and affirmed the principle that a guilty plea must be voluntary and at the time he pleaded, the accused was adjudged to such pressure that he did not genuinely have a free choice between 'guilty' and 'not guilty', his plea is a nullity: Pressure to plead may come from a number of source; the court, defence counsel or other factors. Whatever the source, the effect is the same.

- [56] In **Nalave v State** Criminal Appeals AAU0004 of 2006; AAU005 of 2006: 24 October 2008 [2008] FJCA 56, the Court of Appeal held:

'It has long been established that an appellate court will only consider an appeal against conviction following a plea of guilty if there is some evidence of equivocation on the record (Rex v Golathan (1915) 84 L.J.K.B 758, R v Griffiths (1932) 23 Cr. App. R. 153, R v. Vent (1935) 25 Cr. App. R. 55). A guilty plea must be a genuine consciousness of guilt voluntarily made without any form of pressure to plead guilty (R v Murphy [1975] VR 187). A valid plea of guilty is one that is entered in the exercise of a free choice (Meissner v The Queen [1995] HCA 41; (1995) 184 CLR 132).'

- [57] In **Maxwell v The Queen** (1996) 184 CLR 501, the High Court of Australia at p. 511 said:

'The plea of guilty must however be unequivocal and not made in circumstances suggesting that it not a true admission of guilt. Those circumstances include ignorance, fear, duress, mistake, or even the desire to gain a technical advantage. The plea may be accompanied by a qualification indicating that the accused is unaware of its significance. If it appears to the trial judge, for whatever reason, that a plea of guilty is not genuine, he or she must (and it is not a matter of discretion) obtain an unequivocal plea of guilty or direct that a plea of not guilty be entered.'

- [58] I have already referred to the proceedings in the High Court and when assessed against the judicial pronouncements quoted above, I am convinced that the 03rd Appellant's plea of guilt had been unequivocal and out of his own free will. In the circumstances, I see no reason to interfere with the plea of guilt and accordingly reject the appeal against the conviction.

Sentence

Parity Principle

- [59] The 03rd Appellant's first challenge to the sentence is based in parity principle. In **Bote v The State** Criminal Appeal No. AAU0011 of 2005S: 11 November 2005 [2005] FJCA 58 parity principle had been described as:

*'The parity principle, which applies where the sentences imposed on co-offenders are so disproportionate as to leave the offender with the larger sentence, with a justifiable sense of grievance (**Lowe v. The Queen** [1984] HCA 46; (1984) 154 CLR 606 and **R v. Fawcett** (1983) 5 Cr. App. R (S) 158), does not apply in such a situation.'*

- [60] In **Ratumaiva v The State** Criminal Appeal No. AAU0060 of 2005S:24 March 2006 [2006] FJCA 21 the Court of Appeal quoted from **R v Lawson** [1982] 2 NZLR 214 the following passage with approval.

'Sentencing is not an exact science and the circumstances of one offender can rarely be closely compared with those of another. The sentencing judge must not only consider the relative involvement of the individuals in the offence but also the mitigating factors affecting each. But a marked difference in the sentences imposed on co-offenders, and for which no justification can be shown, may be of importance to the administration of justice generally in that such a marked and unjustified difference will tend to bring the administration of justice into disrepute. The courts must bear in mind that public confidence in the administration of justice is best preserved if justice appears to be administered even-handedly.'

- [61] In **Wise v State** Criminal Appeal No. AAU0020 of 2011:05 December 2014 [2014] FJCA 184 the Court of Appeal *inter alia* dealt with the parity principle as follows:

'Where an offender has received a sentence which is not open to criticism when considered in isolation, but which is significantly more severe than has been imposed on his accomplice, and there is no reason for the differentiation, the Court of Appeal may reduce the sentence, but only if the disparity is serious.'

- [62] The reason why the 03rd Appellant had received a higher sentence had been explained by the Learned Trial Judge in his Sentence Order in the following terms.

'The first accused was without doubt the ring leader and guiding force in this horrific irruption. He had previously worked for the Anselmes but had been dismissed and was aggrieved. He organized the whole robbery and chose the "team". He was a friend of Roger, the son who looked up to him as an elder "brother" and the 1st accused betrayed that trust.'

- [63] Accordingly the Trial Judge had added 03 more years to the base aggregate sentence of 15 years and reduced 06 years for the guilty plea and 08 months in remand to arrive at the sentence of 12 years (i.e. 18 - 06).

- [64] As the Summery of Facts reveal, I cannot find anything wrong with the above observations of the Trial Judge. Neither do I feel that the Trial Judge was unjustified in adding 03 more years to the base sentence. The 03rd Appellant's criminality could be clearly distinguished from the rest of the accused. Thus, a different and higher sentence is not only justified but warranted.

- [65] Accordingly, I reject this ground of appeal.

Failure to separately discount the remand period

- [66] The 03rd Appellant had also challenged the sentence on the ground that the Trial Judge had not complied with section 24 of the Sentencing and Penalties Act, 2009. Section 24 states that:

'If an offender is sentenced to a term of imprisonment, any period of time during which the offender was held in custody prior to the trial of the matter or matters shall, unless a court otherwise orders, be regarded by the court as a period of imprisonment already served by the offender.'

- [67] It is clear from the Sentencing Order that the Trial Judge had arrived at 12 years of imprisonment after adding 03 years to the 15 years of base aggregate. He had then stated that there were mitigating factors to be considered apart from the plea of guilt. Though not specified, it is very clear that the period deducted for the guilty plea had been 05 years as had been done in respect of all other accused. The Trial Judge had

then proceeded to deduct 06 years from 18 years and arrived at 12 years as the sentence the 03rd Appellant should serve. I have no doubt that that the Trial Judge had indeed regarded 01 year instead of 08 months (which obviously had been to the benefit of the 03rd Appellant) as a period of imprisonment already served.

- [68] The Supreme Court in Sowane v State Appeal Case No. CAV0038 of 2015: 21 April 2016 [2016] FJSC 8] said of section 24:

'The provision is mandatory. For the court shall regard any period of time during which the offender has been held in custody prior to the trial of the matter or matters as a period of imprisonment already served by the offender, "unless a court otherwise orders."'

'By what methodology is that to be done? In the past courts have commenced that process by fixing a sentence on a range approved by decisions of the courts, usually with the authority of one of the appellate courts. The sentencing judicial officer proceeds to give some increase of sentence for specified aggravating factors, and some discount for approved mitigating factors. Within mitigating factors is often included the period spent on remand by the offender in custody awaiting his trial. If this is done, the final term of imprisonment imposed could sometimes fall well below the normal tariff for such offending.'

'Alternatively the sentencing court could carry out the calculation by the above method, and initially without regard to the period spent in custody, state the sentence for the particular offending. Secondly, the court could go on to set out the actual sentence to be served, after deducting the period of prior custody referred to in section 24. Such a judgment would state what the court's sentence was for the gravity of the offending, and at the same time – by the court's order pursuant to section 24 – set out and hand down the effective sentence that must be served, prior to the consideration of any eligibility for parole, a matter not of sentence but of administrative action within the jurisdiction of the Corrections Department.'

- [69] Thus, it appears that the Supreme Court had preferred the 'alternative' method set out above. In the instant case, the Trial Judge for all intent and purposes appears to have done that though he could have set out that in clearer terms. The 03rd Appellant had got more than his period of remand deducted from the sentence he has to serve.

- [70] I see no merit on this ground of appeal and therefore, reject the same.

Enhancement of the sentence

[71] I shall now consider the adequacy of the sentence imposed on the 03rd Appellant. I need not reiterate what is stated above on this aspect but as a prelude to question of enhancement I remind myself of the same here as well. In my view the sentence of 12 years imposed by the Trial Judge does not reflect the gravity of the offences committed by the 03rd Appellant and needs to be revisited.

[72] For the reasons set out in greater detail above, I think the starting point for manslaughter and aggravated robbery should be 12 years. As already done by the Learned Judge, I also add 05 years for the common aggravating factors and 01 1/2 years for the additional aggravating factors specific to 03rd Appellant thus arriving at a sentence of 18 1/2 years. I would then give a discount of 02 1/2 years for the plea of guilt and arrive at the sentence of 16 years. I would then consider 08 months of remand period as a period of imprisonment already served by the 03rd Appellant.

[73] Accordingly, I decide that the 03rd Appellant should be sentenced to an imprisonment term of 15 years and 04 months with 13 years as the minimum period to be served before becoming eligible to be released on parole. Thus, the sentence passed at the trial is quashed and the following sentence is passed in substitution thereof.

Head Sentence – 15 years and 04 months.

Minimum period to be served – 13 years

[74] Finally I like to remind myself of the observations of the Supreme Court on sentencing in Koroicakau v The State CAV0006Uof 2005S: 4 May 2006 [2006] FJSC 5 ' *It is the ultimate sentence that is of importance ,rather than each step in the reasoning process leading to it*'.

[75] I believe that the ultimate sentences I have proposed on the 02nd and 03rd Appellants are in harmony with the previous judicial pronouncements and would serve the cause of justice.

Temo, JA

[76] I have read in draft the judgment of Prematilaka JA and I agree with the reasoning and the orders proposed therein.

Orders of the Court are:

1. 02nd and 03rd Appellant's Appeals are dismissed.
2. Conviction against 03rd Appellant is affirmed.
3. Sentences passed on 02nd and 03rd Appellants are quashed.
4. The 02nd Appellant shall serve a sentence of 15 years and 04 months with a minimum period of 13 years to be served before becoming eligible to be released on parole.
5. The 03rd Appellant shall serve a sentence of 15 years and 04 months with a minimum period of 13 years to be served before becoming eligible to be released on parole.



W. D. Calanchini

Hon. Mr Justice W. D. Calanchini
PRESIDENT, COURT OF APPEAL

C. Prematilaka

Hon. Mr Justice C. Prematilaka
JUSTICE OF APPEAL

S. Temo

Hon. Mr Justice S. Temo
JUSTICE OF APPEAL